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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA

11 IN RE: Case No. 2:07-CV-892-RCJ-GWF-BASE
12 USA COMMERCIAL MORTGAGE Consolidated with Case Nos.
13 COMPANY, 2:07-cv-1389-RCJ-GWF
14 Debtor. 3:07-cv-00241-RCJ-GWF
15 3685 SAN FERNANDO LENDERS, LLC, 2:07-cv-00894-RCJ-GWF
16 *et al.*,
17 Plaintiffs,
18 v.
19 COMPASS USA SPE, LLC, *et al.*,
20 Defendant.
21

22 **TRIAL MEMORANDUM OF DEFENDANTS COMPASS PARTNERS, LLC,**
23 **COMPASS USA SPE, LLC, BORIS PISKUN, AND DAVID BLATT IN**
24 **CONNECTION WITH RULE 55(b)(2) DAMAGES ADJUDICATION**

25 Defendants COMPASS PARTNERS, LLC, COMPASS USA SPE, LLC, BORIS
26 PISKUN and DAVID BLATT offer the following trial memorandum for the Court's
27 consideration.
28

1 The Court entered a default against the Compass entities, Mr. Piskun, and Mr. Blatt on
 2 January 25, 2010 (#1632). Attorney Michael Rawlins filed a Motion to Reconsider Order
 3 Granting Request for Entry of Default of Defendants Compass USA SPE, LLC, Compass
 4 Partners, LLC, Boris Piskun, and David Blatt, and Denying Boris Piskun's Motion to Vacate
 5 Entry of Default (#1652).¹ At a hearing conducted on April 8, 2010, the Court announced that it
 6 was denying the motion.²

7 The Court's January 25, 2010 order granting the request for entry of default (#1632)
 8 stated that "Boris Piskun may present evidence in support of a defense of excusable neglect on a
 9 motion for reconsideration and/or at trial, including but not limited to any evidence of an
 10 extension of time to file an answer to Plaintiffs' Second Amended Complaint."³ Further, during
 11 the underlying January 5, 2010 hearing the Court stated that Mr. Piskun would be allowed to ask
 12 questions of witnesses during the damages prove up hearing, hopefully through counsel.
 13

14 However, having said that, Mr. Piskun, where you do come and oppose a default, courts
 15 -- all courts commonly acknowledge your right to appear on the prove up to ask
 16 questions if appropriate. And therefore, I'm assuming that the prove up will be probably
 17 at the same time as we have the trial here. I will permit you to appear hopefully by
 18 counsel, but if not by counsel by yourself then even to ask questions or to enter a position
 19 relative to prove up damages.

20 (Ex. 1, attached, Transcript of 1/5/10 hearing, p. 44.) Although only Mr. Piskun appeared before
 21 the Court on January 5, 2010 to oppose entry of the default, since that time Mr. Blatt and Mr.

22 ¹ The body of the motion stated that only Mr. Piskun and Mr. Blatt were the moving
 23 parties. (#1652, p. 1.)

24 ² Although titled as a motion to reconsider, the motion (#1652) was actually a motion by
 25 Mr. Piskun and Mr. Blatt to set aside the default. At the time Mr. Piskun appeared before the
 26 Court on January 5, 2010 to argue against entry of the default, the default had not yet been
 27 entered. Thus, his oral motion and letters to the Court actually constituted an opposition to
 28 Plaintiffs' motion requesting entry of the default, and Mr. Rawlins' February 19, 2010 motion
 was the initial motion to set aside by Mr. Piskun and Mr. Blatt. The resulting minute order
 (#1674) stated that a "Written ruling of the Court will issue," but to the best of the undersigned's
 knowledge no such order has been entered.

³ The Compass entities have not yet filed a motion to set aside the default, but intend to do
 so as soon as possible.

Piskun have moved to set it aside (through a motion mis-named as a motion to reconsider [#1652]), and the Compass entities are in the process of preparing a motion to set aside the default as well. Thus, each will have challenged entry of the default, and each ought to be afforded the ability to participate in the prove-up hearing. It is on this basis that the Compass entities, Mr. Piskun, and Mr. Blatt file this Trial Memorandum.

**IN THE EVENT THE JURY RETURNS A DEFENSE VERDICT
IN FAVOR OF THE SILAR ENTITIES WITH RESPECT TO
PLAINTIFFS' CLAIMS, A DEFAULT JUDGMENT MAY NOT BE
ENTERED AGAINST THE PREVIOUSLY-DEFAULTED DEFENDANTS
BASED UPON THOSE CLAIMS**

This case presents a situation in which the Plaintiffs have sued the Compass entities, Boris Puskin, and David Blatt as well as the Silar entities and Asset Resolution for the essentially the same alleged conduct. *Compare* Second Amended Complaint, with Third Amended Complaint.⁴ As set forth above, the Compass entities, Mr. Piskun, and Mr. Blatt have been defaulted by the Court.

Despite the entry of the default against the Compass entities, Mr. Piskun, and Mr. Blatt, case law clearly holds that under these circumstances the Court should not enter a default *judgment* against the moving Defendants if the Silar entities are found not liable for the same underlying conduct which has been alleged against the defaulted Defendants. In the leading case of *Frow v. De La Vega*, 82 U.S. 552 (1872), the Supreme Court explained that where a complaint alleges that multiple defendants are jointly and severally liable and one of the defendants defaults, judgment should not be entered against the defaulting defendants until the matter has been adjudicated against the remaining answering defendants. "If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause

⁴ The Compass entities, Boris Piskun and David Blatt were defaulted for failing to respond to the Second Amended Complaint. The operative pleading as to the Silar entities and Asset Resolution is the Third Amended Complaint.

1 was proceeding undetermined against the others, then this absurdity might follow: there might be
 2 one decree of the court sustaining the charge of joint fraud committed by the defendants; and
 3 another decree disaffirming the said charge, and declaring it to be entirely unfounded, and
 4 dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this
 5 case. Such a state of things is unseemly and absurd, as well as unauthorized by law." 82 U.S. at
 6 554 (emphasis supplied.) The case of *Gulf Coast Fans, Inc. v. Midwest Electronics Importers,*
 7 *Inc.*, 740 F.2d 1499 (11th Cir. 1984), extended the *Frow* rule to apply to defendants who are
 8 similarly situated, even if not jointly and severally liable.
 9

10 The Ninth Circuit, in the case of *In re First T.D. & Inv., Inc.*, 253 F.3d 520, (9th Cir.
 11 2001), further extended the application of *Frow*:

12 The leading case on the subject of default judgments in actions involving multiple
 13 defendants is *Frow v. De La Vega*, 82 U.S. 552 (1872). The Court held in *Frow* that,
 14 where a complaint alleges that defendants are jointly liable and one of them defaults,
 15 judgment should not be entered against the defaulting defendant until the matter has been
 16 adjudicated with regard to all defendants. *Id.* at 554. It follows that if an action against
the answering defendants is decided in their favor, then the action should be dismissed
against both answering and defaulting defendants."

17 253 F.3d at 532 (emphasis supplied.) The Ninth Circuit held that a default judgment should not
 18 be entered where other defendants were engaged in similar transactions such that it is not
 19 logically possible that one defendant could be liable without another being liable. *Id.* See also
 20 *Lewis v. Duff*, 2008 U.S. Dist. LEXIS 63892 at *16-17 (D. Nev., July 28, 2008) ("If an action
 21 against the answering defendant is decided in [the answering defendants'] favor, then the action
 22 should be dismissed against both answering and defaulting defendants").

23 In the recent case of *Johnson v. Cate*, 2009 U.S. Dist. LEXIS 61293 (E.D. Cal., July 17,
 24 2009), the court explained, "[D]efault judgment should not be entered against a defendant who is
 25 alleged to be liable jointly with other defendants until the case is adjudicated against all
 26 defendants, or all defendants have defaulted; the possibility of inconsistent judgments must be
 27 avoided." *Id.* at *5-6. The court continued, "It has been held that despite the absence of an
 28 allegation of joint liability, entry of default judgment against a single defaulting defendant is

1 improper where defendants are similarly situated defendants, even if not jointly and severally
2 liable, and where delay is necessary to avoid an inherently inconsistent result.” *Id.* at *6.

3 The situation in this case is similar to that in *In re First T.D. & Inv.* in that, under
4 Plaintiffs’ theory, the Defendants in this case were “engaged in similar transactions such that it is
5 not logically possible that one defendant could be liable without another being liable.” The
6 Court should not entertain the legal fiction that the Compass entities, Mr. Piskun, and Mr. Blatt
7 actually committed in fraud, breach of fiduciary duty, constructive fraud, and conspiracy if the
8 jury finds as a matter of fact that the Silar entities and Asset Resolution did not engage in that
9 very same conduct in the same or similar transactions.

10 DATED this 12th day of May, 2010.

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11
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of LAXALT & NOMURA, LTD., and that on this 12 day of May, 2010, I caused a true and correct copy of the foregoing to be served:

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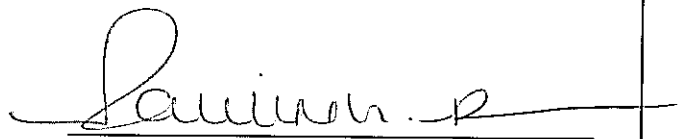
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